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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER, 1972

No. 72-794

BARBARA SUSAN PAPISH,
Petitioner,
v.
THE BOARD OF CURATORS OF THE UNIVERSITY OF MISSOURI, et al.,
Respondents.

RESPONDENTS' PETITION FOR REHEARING and RESPONDENTS' SUGGESTIONS IN SUPPORT THEREOF

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St. Louis Law Printing Co., Inc., 411-15 N. Eighth St. 63101 314-231-4477

INDEX

Page

Petition for Rehearing 1

Suggestions in Support of Petitioners' Petition for Rehearing 7

I. Issuance of per curiam opinion of reversal on merits was improper where only matter pending before Court was "Petition for Writ of Certiorari to the United States Court of Appeals for the 8th Circuit" 7

II. Newspaper and Distribution thereof was not protected free speech under the First Amendment 10

III. A state university has a valid interest in reasonably regulating the time, place and manner of distribution and forbidding distribution of indecent and obscene literature 17

Certification of Respondents'-Petitioners' Counsel A-1

Table of Cases

Barker v. Hardway, 399 F.2d 638 (4th Cir. ....), cert. denied 394 U.S. 905, 89 S. Ct. 1009 16

Chaplinsky v. New Hampshire, 315 U.S. 568 18

Esteban v. Central Missouri State College, 415 F.2d 1077 (8th Cir. 1969) 17

Ginsberg v. New York, 88 S.Ct. 1274 14

Ginzburg v. U.S., 383 U.S. 463, 86 S. Ct. 942 (1966)..13, 14

Haldeman v. U.S., 340 F.2d 59 (C.A. 10, 1965) 14

Healy v. James, 408 U.S. 169 (1972) 9

Miller v. U.S., 431 F.2d 659 (C.A. 9, 1970) 14
Mishkin v. New York, 86 S.Ct. 958 ..... 13, 14

Papish v. Board of Curators of University of Missouri, 464 F.2d 136 (1972) A-1

Redrup v. New York, 386 U.S. 767, 87 S.Ct. 1414 14
Roth v. U.S., 354 U.S. 476, 77 S.Ct. 1304 (1957) .. 13, 14, 18

Stanek v. U.S., 368 F.2d 788 (1st Cir. 1966) 9
State v. Ceci, 255 A.2d 700 Del. 15

Other Authorities

Anno. Obscenity, 5 A.L.R.2d 1158 14

Lewdness, Indecency & Obscenity, 50 Am. Jur., §2, p. 451 18

45 Minn. L. Rev. 5 14

28 U.S.C.A., §2106 8

20A Words and Phrases, p. 520 18

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PETITION FOR REHEARING

Come now the Petitioners, the Board of Curators of the University of Missouri, et al., Defendants, Respondents, in the above entitled case, and respectfully submit this Petition for Rehearing pursuant to Supreme Court Rule 58 upon the following grounds:

1. The Petitioners submit that the Court did not **lawfully** have before it the above entitled case for the purpose of rendering a decision on the merits; but rather had the sole question of whether to grant or deny the petition for a writ of certiorari filed by Barbara Susan Papish, which petition sought a future review on the merits of the decision of the 8th Circuit Court of Appeals.

2. The Supreme Court of the United States by rendering a summary decision on the merits effectively negated its own rules governing matters to come before it in that those rules do not provide for, nor contemplate, the rendering of a decision on the merits when the only subject matter pending before the Court is a petition for Writ of Certiorari.

3. Petitioners herein were denied due process of law because petitioners were not afforded the opportunity to present written briefs on the merits and the opportunity to present oral argument on the merits of the case.

4. The Supreme Court of the United States rendered a decision on the merits without having before it the record of the case as established in the Federal District Court for the Western District of Missouri and the 8th Circuit Court of Appeals, which record would disclose evidence and facts essential to a decision which effects the future of Higher Education, in the following particulars:

a. the court did not have before it a copy of the newspaper which was being distributed so as to observe first hand the impact of the material therein.

b. the court was not correct in its opinion when it assumed the article in the newspaper concerns a member of an organization known as "Up Against the Wall, M—— F——" because the article does not at any place therein name the organization and a reading of the article re-

veals no logical or rational relationship between the headline "M—— F—— Acquitted" and the content of the article.

F—— Acquitted" would not be allowed as it was in violation of the University code of student conduct; which statement was recorded by local and student newspapers, radio and television media and received widespread publicity; that Barbara Susan Papish intentionally violated this directive and the rules and regulations of the University thereafter on February 19, 1969, by selling and distributing the newspaper which is the subject of this litigation, which newspaper contained front page headlines above the cartoon of "Banned From the M.U. Union" "See related stories" as well as the second page headline "M—— F—— Acquitted."

d. That the above specified previous widespread publicity throughout the University and community and the following utilization of headlines of "Banned From the M.U. Union" had the factual and legal significance of enticing the student body, faculty and visitors of the University to purchase the newspaper, thereby effectively engaging Barbara Susan Papish in "pandering" the newspaper by the manner of distribution.

5. That the matter before the Supreme Court of the United States was not a case concerned solely with free speech, but upon a review of the record would reveal it to encompass the questions of time, place and manner of distribution and the intentional violation of a directive of a University official.

6. That the impact of the summary decision on the future of all public institutions of higher education in the United States and their responsibility and mission to educate young people in preparation of their present and future contribution to a civilized and orderly society sug-

gests that such a broad sweeping proclamation of the law should be issued only after petitioners have had an opportunity to present the case on the entire record and the Court has had the benefit of briefs and oral arguments on the merits.

c. that on the 12th day of February, 1969, the Dean of Students read a formally prepared statement to a large crowd of students in Memorial Student Union, which crowd included Barbara Susan Papish, informing the students that distribution of literature with headlines "M——

7. That a state university has a valid and paramount interest and obligation to society not in inhibiting or restraining free speech and the free interchange of ideas, but, in assuring that the form of language used (on a public campus with many young people and students) in expressing and presenting such ideas is acceptable in the academic community and not abhorrent to the vast majority of the public. This mission of an institution of higher education cannot be carried out without the right to place some limitation on the time, place and manner of expression of its constituents, all as measured by contemporary community standards.

8. That the Petitioners have requested the certification and transmittal of the record to the Clerk of the Supreme Court of the United States and hereby incorporate the certified record as part of this motion by reference.

9. That the Petitioners request the Supreme Court to grant oral argument on this Petition for Rehearing.

Wherefore, the Petitioners respectfully pray the Supreme Court to grant oral argument on this Petition for Rehearing and to thereafter enter its order granting a rehearing in the case of Papish v. The Board of Curators of the University of Missouri, et al., No. 72-794, and that all

parties thereto be directed to file briefs on the merits and that the matter be docketed for oral argument.

Respectfully submitted

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SUGGESTIONS IN SUPPORT OF PETITIONERS' PETITION FOR REHEARING

I

Issuance of Per Curiam Opinion of Reversal on Merits Was Improper Where Only Matter Pending Before Court Was "Petition for Writ of Certiorari to the United States Court of Appeals for the 8th Circuit."

The Constitution of the United States of America, Article III, entitled "Judicial Department" in Section 2

thereof, provides that the Supreme Court shall have appellate jurisdiction both as to law and facts on cases such as the case at bar with, however, such exception and under such regulations as shall be prescribed by Congress. Congress, in 28 U.S.C.A., Section 2106, entitled "Determination", has provided that "the Supreme Court or any other Court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree or order of a court lawfully brought before it for review, ..." It is submitted that the only question which was "lawfully" brought before the Supreme Court was the question of whether the Supreme Court would grant or deny the Petition for a Writ of Certiorari filed in the Supreme Court by Barbara Susan Papish. A Petition for a Writ of Certiorari should not be deemed as the final step necessary for the Supreme Court to render a decision on the merits as is conclusively evidenced by Supreme Court Rule 23 which sets forth the matters to be contained in a Petition for a Writ of Certiorari. The Rule contains no provision for the briefing or submission of legal controversies on the merits to place the Supreme Court in a position to render a final decision upon the merits of the case.

An exhaustive review of the Supreme Court rules does not reveal a provision nor any inference indicating that the Supreme Court will render a per curiam decision on the merits when the only pending matter is a Petition for Writ of Certiorari. The Supreme Court rules in fact do provide under Rule 25 thereof that the action to be taken upon a Petition for a Writ of Certiorari shall be an order either granting or denying such petition. Further evidencing the lack of provision for a summary decision on the merits when the only matter pending is a Petition for Writ of Certiorari is Supreme Court Rule 41 which specifically provides that counsel for the Appellant or Petitioner shall file printed briefs on the merits within 45 days of the order granting the Writ of Certiorari. This

Rule would seem to conclusively establish that the Supreme Court deems it absolutely essential to the orderly administration of fair and impartial justice to have before it printed briefs on the merits and oral argument under Supreme Court Rule 44 prior to its rendering a decision on the merits.

Supreme Court Rule 19 contains provisions relating to the considerations governing the review on certiorari. Of all the provisions contained therein, the only conceivable provision applicable to the case at bar is that of "has decided an important question of federal law which has not been, but should be, settled by this court"; it is further pointed out that one of the grounds stated therein for granting a Petition for Writ of Certiorari is where a lower federal court "has so far departed from the accepted and usual course of judicial proceedings." It would appear that the Supreme Court in issuing its per curiam opinion on the merits in the case at bar has in fact departed from its accepted and usual course of judicial proceedings.

Mr. Justice Rehnquist in dissenting from the per curiam opinion states that one of the holdings of the case of Healy v. James, 408 U.S. 169 (1972), is that the public university there involved had not afforded adequate notice and hearing of the action it proposed to take with respect to the students involved. It is submitted that Petitioners, a public university, should be afforded the same judicial opportunity and due process of law as the federal courts have extended to students, by being afforded an opportunity to present a brief on the merits and to be afforded a hearing by way of oral argument to the Supreme Court.

The case of Stack v. United States, 368 F.2d 788 (1st Cir., 1966), provides that a petition for rehearing is not to be filed simply to re-argue matters already argued but is to correct demonstrable error or oversight either by the

court or by counsel. It is respectfully submitted that the Petitioners herein are not seeking a rehearing but are rather seeking an opportunity for the first time to be heard by the Supreme Court prior to the Supreme Court issuing a decision on the merits.

II

Newspaper and Distribution Thereof Was Not Protected Free Speech Under the First Amendment.

The Supreme Court in issuing its per curiam opinion did so without the benefit of having before it the entire record of the proceedings in the lower federal courts. The Supreme Court apparently felt that the facts of the case were such as to present solely a legal issue of pure free speech, without any question of time, place and manner of distribution or that of deliberately violating a directive of a University official. Footnote 6 of the per curiam opinion provides: "As the Court of Appeals opinion states, '[T]he facts are not in dispute' 464 F2 at 138." The per curiam opinion provides on page 4 thereof "the facts set forth in the opinions below show clearly that petitioner was dismissed because of the disapproved content of the newspaper rather than the time, place or manner of its distribution."

It is submitted that the only facts before the Court were those recited in the opinions of the lower federal courts, since the record of the case was not certified and transmitted to the Supreme Court. Those opinions did not recite all of the facts about which there is no dispute, obviously feeling it unnecessary due to the legal theories which were utilized to reach their final decisions. There are facts, however, which were not contradicted, contained in the record and not the opinions, that are crucial to a legal determination of the case at bar, particularly in view of the basis of the Supreme Court's summary opinion.

It would appear that it would have been advantageous for the Court to have had a copy of the newspaper before it so as to observe first hand the impact of the material contained therein prior to the Court rendering a decision that the contents thereof were constitutionally protected. Since the opinions of the lower federal courts did not reproduce the newspaper and the Supreme Court did not have the record of the case before it, it must be assumed that the Court did not see nor study the publication.

The benefit to be derived from having the newspaper before the Court is evidenced in the first page of the Supreme Court's per curiam opinion when the Court says the article discussed a New York youth who was a member of an organization known as "Up Against the Wall, M—— F——". The article did not name any organization and in fact the contents of the article had no rational, logical or recognizable relationship to the blatant and scurrilous headline "M—— F—— Acquitted." In this respect it is submitted that even if the organizational name had appeared in the article it would not have enlightened Petitioners. Petitioners are, however, unaware of whether the organization was well known on the east coast of the United States since in the State of Missouri the name had certainly not appeared in print in any newspaper. Further, the fact was not before the Court that the front page of the newspaper immediately above the cartoon contained the bold headline of "Banned From the M.U. Union" and in somewhat smaller type "See Related Stories". These headlines are discussed later in consideration of the manner of distribution.

The record of the case contains the testimony of the Dean of Students, which was not contradicted by Barbara Susan Papish or any other witness, that on February 12, 1969 (one week prior to the matter in controversy), the Dean of Students read a formally prepared statement to a large crowd of students, including Barbara Susan Papish,

in Memorial Student Union informing them that distribution of literature with headlines "M—— F—— Acquitted" would not be allowed as it was in violation of the University Code of Student Conduct. It is of utmost importance to the case at bar that the facts also reveal that at the time of giving the formal prepared statement and thereafter, the statement was recorded by local and student newspapers, radio and television media and received widespread publication and publicity.

For several days following the Dean of Students' statement the campus community of the University widely discussed the Dean of Students' actions and several confrontations relating to the statement and the Dean of Students forbidding distribution of the material took place. (All of above facts set forth in direct testimony of Dean of Students Jack Matthews, Stipulation III, Exhibit 3 filed in United States District Court for the Western District of Missouri on September 21, 1969.) These facts conclusively show that the distribution of the specified type of literature was forbidden and that throughout the campus and surrounding community there had been widespread publicity of the Dean of Students' action.

It was then, on the 19th of February, 1969, under these circumstances that Barbara Susan Papish distributed the newspaper on the campus bearing the front page headline of "Banned From the M.U. Union" and "See Related Stories". It is hard to envision a more ideal set of circumstances under which to entice college students, faculty and visitors to purchase a newspaper by using the headline "Banned From the M.U. Union". This headline was a come on for everyone, irrespective of age and maturity, to purchase the newspaper and see and read the materials which had previously received such widespread publicity and indicating the material therein was obscene, indecent, lewd, and of a scurrilous nature since it had been banned by the University. The label of "Banned From the M.U.

Union" carries the same connotation in Columbia, Missouri, as does "Banned in Boston" to the east coast.

It is submitted that these facts, which were not considered by the Supreme Court, show that the **time, place** and **manner** of distribution were most certainly an integral part of the case and the case should not turn on the sole issue of "pure" free speech. The manner of distribution reveals that the publication in controversy, with the cartoon and language contained therein, was not protected speech under the Constitution of the United States, particularly when measured under the doctrine of pandering as established by the Supreme Court. Roth v. U.S., 354 U.S. 476, 77 S. Ct. 1304 (1957), Ginzburg v. U.S., 383 U.S. 463, 86 S. Ct. 942 (1966). The prospective audience for distribution included a student body of which over 25 percent were first time freshmen directly out of high school, some as young as 16 years of age and of the entire student body 72 percent were under age 21. (Direct and cross-examination of Chancellor John W. Schwada and Dean of Students Jack Matthews, Stipulation III and transcript of testimony in Federal District Court, P. ....). As stated in Mishkin v. New York, 86 S. Ct. 958, 964, "We adjust the prurient appeal requirement to social realities by permitting the appeal to be assessed in terms of its intended and probable recipient group".

Under the circumstances of the case at bar and in light of federal obscenity standards set forth in Roth v. United States, supra, and Ginzburg v. United States, supra, it can hardly be questioned that the cartoon, the suggestive front page headline and the scurrilous headline of "M—— F—— Acquitted" taken together, are obscene. The cartoon graphically depicts a rape scene with excessively stark realism, including the bare parts of the bodies of the participants and victims, and seeks to capture the attention of potential readers by its graphic portrayal of the shocking sexual extremes of sadism and masochism. When added

to the explicitness of the second-page headline, the newspaper cannot be viewed otherwise than an attempt to promote a "shameful or morbid interest in . . . sex" in a way which "goes substantially beyond customary limits of candor in description or representation of such matters." Anno., Obscenity, 5 A.L.R. 3d 1158, 1171; Haldeman v. United States (C.A. 10), 340 F.2d 59.

It would appear that, under the governing standard of Roth v. United States, supra, to the average person applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest and is utterly without redeeming social value. This is particularly true in the state university community, in which the state has a particular interest in protecting younger citizens from obscenity. Ginsberg v. New York, supra. Circulation of obscene material "indiscriminately", or with reckless disregard whether it will fall into the hands of juveniles has been held to violate the standards of Redrup v. New York, 386 U.S. 767, 87 S. Ct. 1414, and Ginsberg. See Miller v. United States, supra, 431 F. 2d at 659. Ginsberg condemns "exposure [of minors] to material . . . harmful to minors." 88 S. Ct. at 1281.

Further, under the concept of "variable obscenity" approved in Ginsberg, 88 S.Ct. at 1278, n.4, and employed in Mishkin v. United States, supra, it was proper, in determining whether the distributed materials were obscene, to consider that the entire population to which the newspaper was sought to be distributed was younger than average. See Ginsberg, supra, at 1278, n. 4, quoting Lockhard & McClure, Censorship of Obscenity: The Developing Constitutional Standards, 45 Minn.L.Rev. 5, 85 to the following effect:

> "Variable obscenity . . . furnishes a useful analytical tool for dealing with the problem of denying adolescents access to material aimed at a primary audience

of sexually mature adults. For variable obscenity focuses attention upon the make-up of primary and peripheral audiences in varying circumstances, and provides a reasonably satisfactory means for delineating the obscene in each circumstance."

The Supreme Court's attention is directed to a case where the language utilized was quite similar to the case at bar. State v. Ceci, 255 A.2d 700, 701 (Del.) involved distribution of materials almost identical to those distributed by appellant in the case at bar. The facts of that case were that:

"On the morning of April 22, 1968, each of the defendants distributed leaflets on the University of Delaware campus. Handprinted in large letters across the top of each leaflet was the quotation 'Up Against the wall M[other] F[ucker].' The last word occupied a separate line and was underlined. Beneath the quotation were several paragraphs which developed the theme that true obscenity was to be found not in words, but rather in the conduct of the Vietnam war by the United States, and in this country's tolerance of black ghettoes."

The Court considered the manner of distribution and the obvious intention that the words appeal to the prurient interest in finding that the publication was obscene. The Court rules that the defendants:

"Could not, under the guise of free speech, commit lewd, obscene or immoral acts in a public place as a prelud to the showing of a documentary film intended to demonstrate the "true" obscenity of the war in Vietnam. [This example], though more drastic [is] in principle the same sort of attention-getting devise as defendants have employed in their leaflet. The fact that the forbidden language appears on the same sheet of paper as does an essay incorporating and explaining

the use of that obscenity brings defendant's conduct to the very dividing line between the permissible and the impermissible, but such a line exists and must be respected . . . But it is well recognized that States and municipalities have a legitimate interest in protecting their citizens from uninvited shocks of this kind. Even assuming that further reading of the leaflet would soothe the reader's initial outrage by revealing the 'obscenity' of the headline as merely an illusion, nevertheless, citizens confronted without their consent and affronted by an obscene headline cannot be required to read on at the risk of further offense.

"In short, having by size of print, placement and underlining of an obscene word taken it out of context so as to maximize its attention-getting potential, defendants will not now be heard to argue that the word must be afforded the same protection it has when taken in context of the body of the essay." 255 A.2d at 704-705.

These suggestions have pointed out facts in this case showing that there is certainly a question of time, place and manner of distribution. Furthermore there must be pointed out that Barbara Susan Papish knowingly violated a directive of a University official when she distributed the newspaper, knowing that the Dean of Students had announced that the language was contrary to the Code of Student Conduct. Surely, this shows that the case is not one of pure speech, but rather is one where pure speech is utilized as an excuse for actions and conduct in violation of the University regulations. A disguise of constitutional free speech does not excuse the violation of a direct and lawful order of a college officer predicated upon educational interests. Barker v. Hardway, 399 F.2d 638 (4th Cir. ....) cert. denied 394 U.S. 905, 89 S.Ct. 1009. The Court's attention is drawn to the fact that the Code of Student Conduct hereinbefore mentioned is not limited to indecent conduct

or speech, but further provides "failure to comply with requests of University officials in the performance of their duties" as an example of conduct which would contravene the accepted standard. Barbara Susan Papish was both charged by the Dean of Students and found guilty by the hearing committee of distributing the newspaper in question with knowledge that the Dean of Students had previously declared the forms of speech therein appearing indecent and distribution thereof improper on the University campus. It would appear that these facts should be sufficient to enable a University to terminate a student. If not, a University has no means of operating an educational institution with any semblance of order and decorum.

III

A State University Has a Valid Interest in Reasonably Regulating the Time, Place and Manner of Distribution and Forbidding Distribution of Indecent and Obscene Literature.

Petitioners have consistently and vigorously adhered to the recognition of First Amendment rights of students, faculty, employees and visitors of the University of Missouri, but at the same time have sought to fulfill the educational mission of a state university and to meet the obligation which the university has to society and particularly the State of Missouri. A state university must of necessity have rules and regulations to guide it in the accomplishment of its educational mission, otherwise there would exist a condition of chaos. Universities most certainly can have reasonable rules and regulations that pertain to the activity and coduct of students. Esteban v. Central Missouri State College, 415 F.2d 1077 (8th Cir. 1969). The Code of Student Conduct of the University of Missouri, partially set forth in footnote 2 of the per curiam opinion, is just such a rule and regulation. That rule informs students that they are

required to observe generally accepted standards of conduct and that indecent conduct or speech would contravene that standard. It is pointed out that the type of speech or activity stated in the rule does not contravene any constitutional rights because the words "indecent" and "obscene" are frequently used to express the same meaning. Roth v. U.S., supra, 50 Am. Jur. 2d, Lewdness; Indecency and Obscenity § 2, pp. 451-452; 20A Words and Phrases, pp. 520-524. It is submitted however, that even if indecent speech is considered as something less shocking that obscenity, certainly a University has such a vital public interest in the form of speech to be utilized on its campus that it can require "decency" in speech during the free expression of ideas and thought within the academic community. In an academic setting, with many young people present, it appears that the rape scene cartoon and the scurrilous headline "M—— F—— Acquitted" are as expressed in Chaplinsky v. New Hampshire, 315 U.S. 568, 572 as being "of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."

The Supreme Court prior to handing down its per curiam opinion did not have the benefit of the record of the case and an opportunity to review the testimony of the obligations and functional missions of the University and the necessity of requiring "decent" language. On this vital point, the Chancellor of the University of Missouri—Columbia campus stated in direct testimony as follows:

> "The University has a vital **educational interest** in the forms of speech and press presentations employed by its students on the University campus. A significant function of the University is to further the concept of orderly, rational presentation of arguments pro and con on virtually all issues and it is expected and generally believed that the educational community

possesses exceptional ability to present and discuss issues without resort to the utilization of emotion producing, shocking, or indecent forms of speech. It is important that the University teach its students to discuss the issues utilizing socially accepted forms of speech. I know of no newspaper in general circulation in this state which has or would have printed the word raised in this case (and most especially in the manner it appears in the questioned publication), and the use of that or comparable words is not commonly accepted practice within the broader community. Additionally, the educational philosophy which prevails within the University communities asserts that learning is not limited to the classroom alone, but takes place through the campus. If this proposition supported by students and faculty, is true, then the University has, in my opinion, an appropriate concern with the quality of activities in the University community. The indiscriminate employment of indecent forms of speech in presenting issues for discussion on the University campus can be prohibited in furtherance of this educational philosophy.

The general public expects, and rightfully so in my opinion, that although wide range of discussion of issues is encouraged by the University indecent forms of speech should not be employed in these discussions, and unless the University opposes the use of indecent forms of speech the public assumes that the University in fact supports, sanctions, endorses and protects such forms of speech as part of the learning process within the University. The public reaction in this case was overwhelmingly in favor of the actions taken by the University. Of the something over 100 letters received, only 2 were in any way critical of the University's position, and most were warmly and vig-

orously in support of it. The University has a vital interest in encouraging the general support of the University by citizens.

Additionally, if the University permits the distribution of indecent forms of speech on its campus, students accept that which is being distributed as in keeping with the University's attitude and philosophy toward the learning process.

The University can legitimately expect, in my opinion, a higher standard of thought, expression and discrimination in the use and presentations of ideas than can be expected of the broader society beyond the campus. Those in attendance are expected to be able to express themselves intelligently, and it is a legitimate purpose of the University to teach students how to discuss intelligently any issue utilizing generally accepted forms.

A significant share of the students at the University of Missouri-Columbia have neither the years nor the experience of Barbara Susan Papish and therefore may not have yet gained the understanding and maturity essential to a careful analysis of that which they may read or hear. Seventy-two per cent of the undergraduate students enrolled on the Columbia campus last fall were under the age of 21 years, and over twenty-five per cent were first time freshmen directly out of high schools of this and other states.

In order to preserve and encourage within the University community the inordinately free expression of thoughts and ideas, the University may legitimately insist, in my opinion, as a very minimal restriction that the thoughts and ideas be expressed without the utilization of indecent and generally unacceptable forms of speech." (Stipulation III, R.51a)

Wherefore, Petitioners respectfully request the Court as follows:

(1) to grant oral argument on this motion

(2) to set aside the per curiam opinion entered herein

(3) to request briefs on the merits and to set the matter for oral argument.

Respectfully submitted

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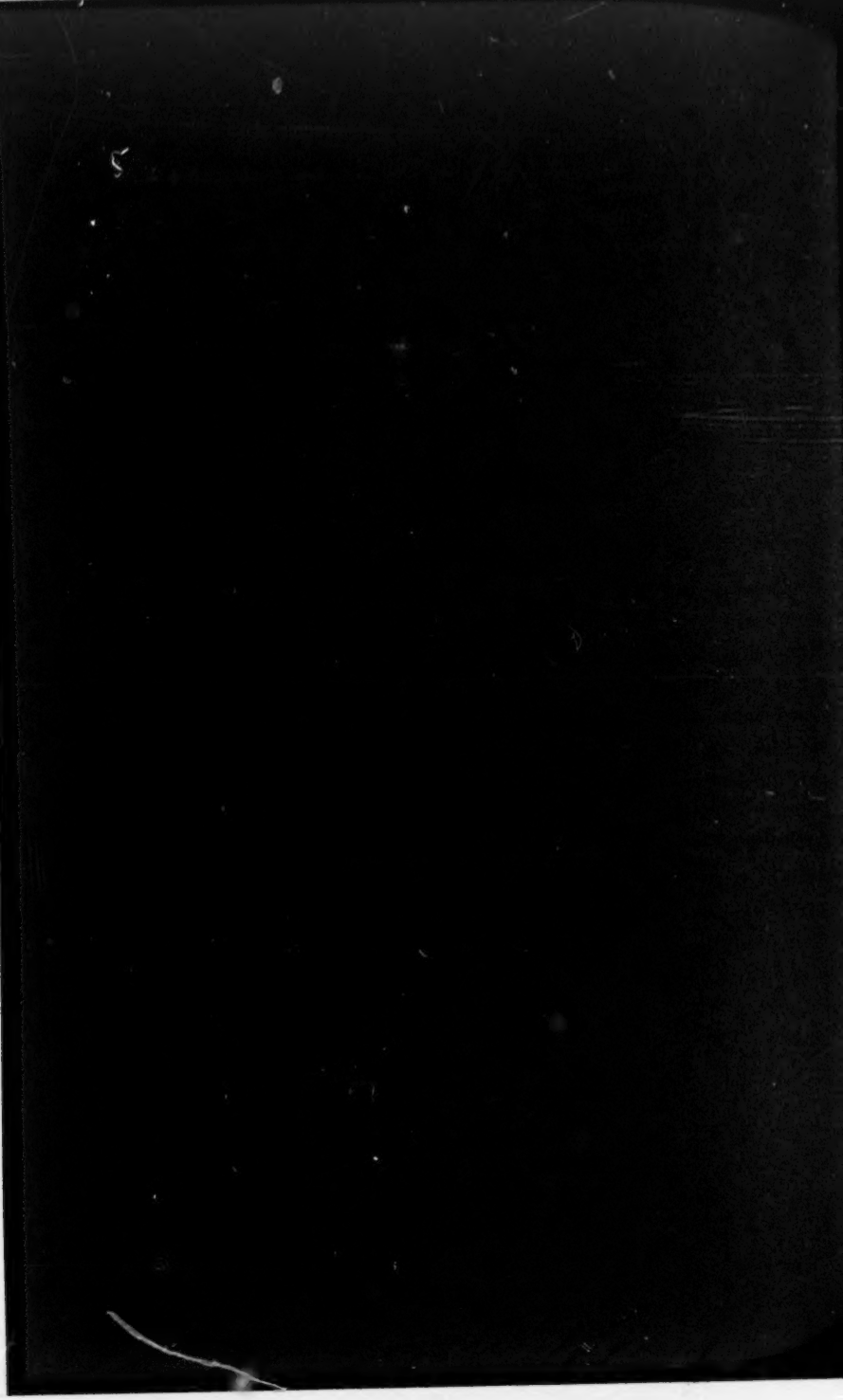

In the Supreme Court of the United States

Barbara Susan Papish
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v.

The Board of Curators of the University of Missouri, et al.
Respondents

No. 72-794

Certification of Respondents'-Petitioners' Counsel

Comes now Jackson A. Wright, General Counsel for The Curators of the University of Missouri, as attorney for the Respondents-Petitioners in the above styled case and pursuant to Rule 58 of the Supreme Court rules of the United States and in accordance therewith and in connection with the Petition for Rehearing hereinbefore set forth states that the Petition for Rehearing is presented to the Supreme Court by the Respondents-Petitioners in good faith and further states that said Petition for Rehearing is not submitted for purposes of delay and further that said Respondents-Petitioners deem the matters set forth in the Petition for Rehearing as being of great substance and importance to institutions of higher education, more specifically the Respondents-Petitioners herein.

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